U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 December 2002

CASE NO: 2000-ERA-7

In the Matter of:

SYED M.A. HASAN,
Complainant

v.

SARGENT & LUNDY,
Respondent

APPEARANCES:

Syed M.A. Hasan, *Pro se*

Harry Sangerman, Esquire
For the Respondent

BEFORE: ROBERT J. LESNICK,
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

PROCEDURAL BACKGROUND

This case arises under the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. The Complainant initially filed his complaint on November 15, 1999, alleging violations of Section 211 of the ERA. The Complainant specifically alleged that Sargent & Lundy, the Respondent, refused to hire him because he had engaged in activities protected under provisions of the ERA.[1] The Complainant alleged that he applied many times for a position as a civil/structural/pipe support engineer with the Respondent. Mr. Hasan filed his complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that the Respondent engaged in discrimination and retaliation when it refused to hire him. The Complainant claimed this treatment was a result of his raising safety concerns while working at Commonwealth Edison's LaSalle Nuclear Station.

[1] The Complainant filed safety complaints against Sargent & Lundy while working for Commonwealth Edison at their LaSalle Nuclear Station. Sargent & Lundy was a contractor to Commonwealth Edison at that time.

OSHA investigated the complaint and on December 17, 1999 determined it was without merit. On December 21, 1999, the Complainant filed objections and requested a hearing before an Administrative Law Judge. The case was referred to the Office of Administrative Law Judges on January 24, 2000.

On July 25, 2000, *sua sponte*, I issued an Order to Show Cause as to why this complaint should not be dismissed. The Complainant submitted his response on August 7, 2000. It was then determined that the Complainant failed to submit evidence to this Court which alleged any set of facts upon which relief could be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Evidence.[2] It was further determined that the Complainant failed to set forth a *prima facie* case of proscribed behavior, or provide a full statement of the acts and omissions, with pertinent dates, which were believed to constitute a violation, in accordance with 29 C.F.R. § 24.5(a)(2).[3] Thus, on October 5, 2000, I issued a Recommended Decision and Order Dismissing the Claim.

The Complainant filed an appeal to the Administrative Review Board ("the Board"). The Board issued an Order of Remand on April 20, 2001. In that Order, the Board stated that in response to the ALJ's Order to Show Cause, "Hasan did not specifically assert that Singh and Hagen participated in the decision not to hire him ... [and] ... the ALJ ... is not obligated to develop arguments on behalf of the complainant." However, even though Hasan failed to state in his pleadings that Singh and Hagen were aware of his protected activities and participated in the decision not to hire him, this admission was in Respondent's answers to interrogatories ("Attachment1"). The Board thus remanded the matter for further consideration consistent with its Order.

I held a hearing in Chicago, Illinois from February 5 - 8, 2002. At that hearing a document listing the qualifications of Respondent's employees was given to the Complainant for the first time. Due to the late submission of this evidence, I found that to avoid any prejudice to the Complainant, a subsequent hearing was necessary to permit the Complainant to review the evidence and prepare a cross examination of Respondent's witness offering this evidence. A second hearing was held May 17 - 18, 2002 in Huntsville, Alabama. Both parties filed multiple post-hearing briefs.

References to "CX" indicate a Claimant's exhibit. "DX" refers to a Defendant's exhibit. References to "ALJX" pertain to the exhibits of the Court. The transcript of the hearing is cited as TR and by page number. Because there were two hearings, in separate cities, TR-IL, followed by a page number, refers to testimony of the first hearing in Chicago, Illinois. References to TR-AL, followed by a page number, pertain to the second hearing, held in Huntsville, Alabama.

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[2] *Hasan v. Sargent & Lundy*, 2000-ERA-7 (ALJ Oct. 5, 2000).

[3] *Id.*

FACTUAL BACKGROUND

Sargent & Lundy is an engineering firm that was founded in 1891. (TR-IL 452). Initially, the business was a production house, but transformed into what is now a consulting engineering firm. (*Id.*) The firm focuses exclusively in the power industry, claiming it has designed more coal-fired units than any other architectural engineer in the United States and has been involved with 31 nuclear power plants. (TR-IL 453). The company is also ISO 9000, which is a world-wide certification, indicating the quality and safety of the company's work. (TR-IL 454).

Syed Hasan was hired by Commonwealth Edison as a contractor at their LaSalle nuclear station. Mr. Hasan began working at the site around November 1998. (TR-IL 123). His job was to review the calculations done by Sargent & Lundy, which was also working as a contractor for Commonwealth Edison at the site. During his review, Mr. Hasan noted the joints attaching vertical and horizontal members. This case includes a detailed discussion about the use of "hinged" versus "fixed" joints.

Mr. Hasan spoke to several people about his concerns regarding the calculations that were done, including his immediate supervisor. (TR-IL 136). He also spoke with other engineers and employees of Commonwealth Edison, the Estes group (another contractor), and Sargent & Lundy. (TR-IL 139-140). After these discussions, Mr. Hasan was not satisfied with the manner in which his complaints were addressed, so he completed the first of many Problem Identification Forms, or PIFs. (TR-IL 142). He also sent several e-mails to officials of the companies regarding Sargent & Lundy's calculations. The dispute between Mr. Hasan and Sargent & Lundy's engineers continued to escalate. Finally, in January 1999, Mr. Hasan contacted the Nuclear Regulatory Commission ("NRC") with his concerns. Mr. Hasan subsequently left his position as a contractor with Commonwealth Edison on March 26, 1999. (TR-IL 123).

The NRC investigated these concerns. On November 2, 1999, the Director of the Reactor Safety Division issued an inspection report. (CX 45). In that report, the NRC noted two violations. The first violation was for inadequate corrective action for minimum fillet weld size. The second item was for inadequate design control for anchor bolt stiffness values. (CX 45). The NRC noted that these violations were of concern because they resulted from inadequate corrective actions; the Commission, however, treated both as non-cited violations in accordance with their enforcement policy. (CX 45).

Mr. Hasan has applied for a position with Sargent & Lundy numerous times. He submitted his resume and application on June 15, 1998, May 19, 1999, July 13, 1999, August 31, 1999 and October 16, 1999. Sargent & Lundy did not offer Mr. Hasan a position. Thus, on November 15, 1999, he filed his OSHA complaint, which initiated this case. Mr. Hasan submitted his resume on two subsequent occasions, December 17, 1999, and January 3, 2000.

APPLICABLE LAW

Any employer who "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates against any employee because the employee has: (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a)..." is deemed to have violated federal law and the regulations.[4]

ELEMENTS AND BURDEN OF PROOF

In a case involving an environmental whistleblower, the complainant has the burden of proof to make a *prima facie* showing that: (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; (3) the respondent was aware of the protected activity when it took the adverse action; and (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action.[5]

If a complainant successfully establishes a *prima facie* case, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action, in order to rebut the complainant's showing.[6] The respondent bears only the burden of production of rebuttal evidence.[7] The complainant may then counter the respondent's evidence by proving by a preponderance of the evidence, that the respondent's reasons are not the true reasons for the adverse action, but rather, a pretext for discrimination.[8] Likewise, at all times, the complainant bears the burden of demonstrating, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity, in violation of the law.[9]

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[4] 29 C.F.R. § 24.2(b).

[5] *Glenn v. Lockheed*, 1998-ERA-35 &50 (ALJ July 15, 1999).

[6] *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y Feb. 15, 1995).

[7] *Shusterman v. Ebasco Servs., Inc.*, 1987-ERA-27 (Sec'y Jan. 6, 1992).

[8] *Id.*

[9] *Id.*

DISCUSSION

Protected Activity

The first element the Complainant must prove is that he engaged in protected activity. The Complainant alleges that Sargent and Lundy has refused to hire him. According to the Complainant, Sargent & Lundy, by this refusal, has engaged in discrimination against him, in retaliation for reporting safety concerns with the Nuclear Regulatory Commission ("NRC"), while working at the LaSalle Nuclear Project.[10] The Complainant filed those complaints while working as a contract employee with Commonwealth Edison; he was hired to review Sargent & Lundy's work at the LaSalle project.

In the RD&O dismissing this claim, I previously found that the Complainant established the protected activity element. Without additional comment, the Board noted my finding. However, the Respondent has challenged that finding. While acknowledging activity such as the Complainant's would typically be considered protected, the Respondent argues that Mr. Hasan's activity was not protected because he was not a good faith whistleblower. Specifically, the Respondent asserts that the Complainant reported his concerns to Commonwealth Edison, and ultimately to the NRC, in order to complete the additional necessary review work, thus extending his employment.[11] Upon cross examination, for example, the Complainant noted that a comprehensive review was necessary, which could take several months. (TR-IL 368). Moreover, the Complainant told Commonwealth Edison that he had to be the one assigned to the review. (TR-IL 369). The practical effect of this assignment, according to the Respondent, would be to allow the Complainant, who has not worked regularly for several years, an opportunity to have steady work.

The Complainant correctly notes that reporting safety concerns or violations to the NRC, an employer, or a contractor, is protected activity. Mr. Hasan further notes that while the law does not require ultimate substantiation of the employee's claims, the claim must be made in good faith.[12]

It is clear from the Complainant's own testimony that he believed that he should be given the assignment to conduct the additional review work and I find that Complainant, in lodging his safety complaint, fully expected to extend his own employment. As a consequence, I might be inclined to find a lack of good faith, were it not for the fact that the safety complaint had merit. While the Respondent raises serious questions about Mr. Hasan's motives, and the record is less

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[10] *See, e.g.*, Complainant's Initial Brief, p. 8 (July 31, 2002).

[11] Respondent's Brief, pp.39-40 (July 29, 2002).

[12] Complainant's Initial Brief, pp. 3-4 (July 31, 2002).

than clear as to the Complainant's true intentions for filing his complaints with the NRC, I find that the Complainant was engaged in protected activity.

Adverse Action

The second requirement for a case of retaliation requires adverse action by the Respondent. When determining whether a complainant has established an actionable adverse action in a failure to hire case, the framework of a *prima facie* case outlined in *McDonnell Douglas Corp. v. Green* applies.[13] In order to establish a *prima facie* showing of discriminatory refusal to hire, the complainant must show that: (1) he applied and was qualified for a job for which the employer was seeking applicants; (2) despite his qualifications, he was rejected; and (3) after his rejection, the position remained open and his employer continued to seek applicants from persons with the complainant's qualifications.[14]

It is noteworthy that this case initially involved one adverse action, the Respondent's failure to hire the Complainant. At the hearing, the parties agreed to permit the Complainant to amend his complaint, which now involves two adverse actions. The first involves the Respondent's failure to hire the Complainant from May 15, 1999 to November 15, 1999, the date Mr. Hasan filed his complaint against Sargent & Lundy. The second adverse action involves a decision by Sargent & Lundy officials never to hire the Complainant for a position.

In its post-hearing brief, the Respondent concedes that the Complainant applied for employment between May 15, 1999 and November 15, 1999, the date he filed his OSHA complaints. The Respondent also notes that the Complainant was not hired. Moreover, in his July 10, 2000 Motion for Default Judgment, the Complainant alleged that between May 1999 and November 1999, the Respondent hired "over forty civil/structural engineers" and had hired additional engineers after November 1999, for the civil/structural/pipe support group. The Respondent does not deny Mr. Hasan's assertions. Thus, the Complainant has met the second and third prongs for a finding of adverse action.

While the Respondent acknowledges that the Complainant applied for positions, counsel argues that Mr. Hasan was not qualified for the positions. The Respondent concedes that Mr. Hasan has the qualifications of an engineer. However, as the Respondent notes, the Complainant was rejected for a position in 1997 because the executives charged with hiring did not believe he was qualified for the available positions. While one interviewer gave Mr. Hasan a favorable recommendation, two others noted his skills were average, and one suggested he was possibly "rusty" due to his three year hiatus from the profession. (CX 13). Artim Dermenjian, who also interviewed Mr. Hasan, explained that "average" meant that the Complainant met the expectation

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[13] *Webb v. Carolina Power & Light Co.*, 1993-ERA-42 (ALJ July 24, 1996)(aff'd, ARB August 26, 1997).

[14] *Id.*

of the interviewers; however, a more attractive candidate is one that exceeds the expectations and has something else to offer as an engineer. (TR-IL 662). Another interviewer stated that the Complainant did not demonstrate adequate technical knowledge of the subject matter. (CX 13). The Respondent thus asserts that, because the Complainant was unemployed much of the time since 1995, he was no more qualified in 1999 than he was in 1997.[15]

Moreover, Sean Hagen testified that from his encounters with the Complainant at the LaSalle project, he did not believe Mr. Hasan had very good judgment, nor did he think Mr. Hasan had a good grasp of how to apply fundamental engineering principles to practical applications. (TR-IL 552). James Kamba testified that the Complainant was an average candidate, but did not have the necessary skills or background to fit into the fossil power group. (TR-IL 680). Likewise, Constantine Petropoulos, who declined to refer the Complainant to a contractor in November 1999, stated that Mr. Hasan's more recent experience was limited to the area of pipe supports. (TR-IL 725). He also did not believe Mr. Hasan had a good understanding of the subject matter. (TR-IL 734).

Mr. Hasan, however, repeatedly argues that he applied for positions for which he was qualified and experienced. In fact, in two separate Motions for Default Judgment, the Complainant stated that he applied to Sargent & Lundy by facsimile or mail on June 15, 1998, May 19, 1999, July 13, 1999, August 31, 1999, October 16, 1999, December 17, 1999, and January 3, 2000.

I note that in the previous RD&O dismissing this case, I found that the Complainant had alleged the elements to establish a *prima facie* case of adverse action by the Respondent. On appeal, the Board noted this finding without additional comment. The Complainant asserts that he applied to Sargent & Lundy for positions for which he was experienced and qualified. He further cites his more than twenty years experience as an engineer. The Respondent counters with Mr. Hasan's limited recent experience, his unemployment, which kept him from continuously practicing and updating his trade, and his lack of a professional license. The evidence thus demonstrates that the Complainant was not qualified for a position with Sargent & Lundy.

In rebuttal to this evidence, Mr. Hasan frequently notes that he applied for, and was willing to accept employment with Sargent & Lundy at any position, for any shift, and for any pay that the Respondent deemed reasonable.[16] He further argues that he was more qualified than those hired, and that the Respondent intentionally took action to avoid hiring him. For example, the Complainant asserts that his resume was selected to forward on to Arkansas Power, if Sargent

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[15] Respondent's Brief, at 39.

[16] *See, e.g.*, Complainant's Response (Second) Brief, at 42 (Aug. 26, 2002). However, during cross examination, the Complainant acknowledged that he would take nothing less than an engineering position.

& Lundy was awarded the bid as a sub-contractor. According to Mr. Hasan, Sargent & Lundy intentionally lost the bid so they would not be forced to hire him. The Respondent strongly denied this accusation, noting that once the bid is submitted, they have no control over who is chosen.[17] (CX 10 at 176). Normally, according to the Respondent, bids are lost either on cost, or because the competition is a local sub-contractor; however, the reasons are never disclosed. (CX 10 at 177).

It is difficult to accept the assertion that a company of Sargent & Lundy's reputation would pass on a contract with such tremendous potential, in order to reject the Complainant one more time, especially without any proof. As for the Complainant's qualifications, the Respondent explained that Mr. Hasan was not hired in 1997 because he was not sufficiently qualified for the position. That rejection was noted on his resume, in accordance with company policy. He was not recommended by the Respondent to one of its clients in 1999, again, because his qualifications fell short of the client's needs.

To establish an adverse action in a failure to hire case, the complainant must show that he applied for a position, which he was qualified for, he was rejected, and the respondent continued to seek applications from persons with the complainant's qualifications. In the instant matter, the Complainant has established that he applied for a position with Sargent & Lundy, they did not hire him, and the position was held open while they reviewed applications from candidates, including those with qualifications similar to Mr. Hasan's. Based on the evidence, though, I find the Complainant has not demonstrated that he was qualified for a position with the Respondent, and thus, was not the subject of adverse action. However, because the Complainant alleged that he applied for *any* position, I will assume, *arguendo*, that he was qualified for a position, and consider the remaining elements.

Respondent's Knowledge of Protected Activity

A complainant must demonstrate that one or more of the respondent's employees, who had input in the hiring decisions, had knowledge of the complainant's protected activity during the relevant time period.[18] Previously, I found that the Complainant failed to allege this point, thereby failing to establish the third element of a *prima facie* case. Accordingly, I dismissed the case.

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[17] This information was disclosed during the testimony of Mr. James Kelnosky, who was the technical staff manager in-charge of the contract resources group. The testimony was presented before Judge Mills, during the Complainant's previous case against the Respondent. The case was styled *Hasan v. Sargent & Lundy*, 1996-ERA-27 (ALJ Aug. 6, 1996). A portion of the hearing transcript was submitted as an exhibit by the Complainant, and is identified as CX 10.

[18] *Floyd v. Arizona Public Service Co.*, 1990-ERA-39, 5 (Sec'y Sept. 23, 1994).

On appeal, however, the Board concluded that the dismissal was premature and remanded for further consideration. The Board specifically found no indication in the record that the assertions regarding the Respondent's awareness of the Complainant's protected activities and participation in the decision not to hire him, were considered. (ALJX 4; 2000-ERA-7, (ARB Apr. 30, 2001)). The Board remanded for a review of the record, especially of an attachment that the Complainant submitted with his Response to a Show Cause Order. In that Response, the Complainant acknowledged that he discussed his safety concerns at the LaSalle site with certain Sargent & Lundy personnel, including A.K. Singh and Sean Hagen. In addition, included in the Attachment was a portion of the Respondent's answers to interrogatories, in which they acknowledged five people who participated in the decision not to hire the Complainant within 180 days prior to his filing his complaint. Those five people included Constantine Petropoulos, Peter Meehan, Lawrence Jacques, A.K. Singh, and Sean Hagen.[19] Moreover, four of these Sargent & Lundy employees also attended a meeting in December 1999, and contributed to a subsequent decision not to hire the Complainant. (TR-IL 500).

After reviewing the record, I find that the Complainant has established that Mr. Hagen and Mr. Singh were aware of his activities. In fact, the Respondent has conceded that it knew of Mr. Hasan's activities.[20] (Respondent's Brief at 41.) Moreover, the record shows that these two individuals also participated in the decision not to hire the Complainant within the 180-day period prior to Mr. Hasan's filing of the complaint. Therefore, I find that the Complainant has demonstrated that the Respondent knew of his protected activity when it refused to hire him.

Protected Activity and Adverse Action Nexus

Finally, a complainant must show that the protected activity was the likely reason for the adverse action. In the instant case, there are actually two adverse actions that must be considered in connection with the protected activity. The first is whether the Respondent's failure to hire within the 180 days prior to filing the complaint (May 15, 1999 - November 15, 1999) was linked to Mr. Hasan's protected activity. Secondly, in December 1999, Sargent and Lundy made a decision to never hire the Complainant. Thus, I also review this action to determine if it resulted from the Complainant's protected activity.

The Complainant asserts that he was not hired by the Respondent, and ultimately banned entirely from future employment with the company, because of retaliation. Mr. Hasan argues that the Respondent made these discriminatory decisions because of past actions he had taken, when he was charged with reviewing Sargent & Lundy's designs and calculations at the LaSalle plant. The Respondent contests the claim of retaliation, arguing that there was a non-discriminatory basis for refusing to hire the Complainant.

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[19] Complainant's Response to Show Cause Order, Attachment 1, at 1.

[20] In its post-hearing brief, the Respondent notes, "S&L concedes that whatever it was that Hasan claims to be protected, S&L knew about it."

180 - Day Statutory Period

As noted above, Mr. Hasan submitted his resume to Sargent & Lundy four times from May 15, 1999 to November 15, 1999. When the Respondent failed to hire him, he filed a complaint for discrimination with OSHA. In his complaint, Mr. Hasan asserted that the Respondent's actions were made in retaliation for complaints he filed with the NRC regarding Sargent & Lundy's work at the LaSalle Nuclear Project, where the Complainant was employed as a contractor, reviewing the Respondent's work.

After reviewing the record, I note that the Complainant and the Respondent's employees vigorously disagreed with each other's positions at the LaSalle site. Moreover, Mr. Hasan applied four times, without success, in the 180 days prior to filing his OSHA complaint. Thus, I think he has raised an inference that his protected activity led to the adverse action. Therefore, I conclude the Complainant has made a *prima facie* showing of a nexus for this adverse action.

If a complainant has established a *prima facie* case, then the respondent may rebut that showing with evidence that the action was taken for a legitimate, nondiscriminatory reason. Counsel for the Respondent asserts that not hiring the Complainant was as much intentional as it was by chance. (TR-AL 142). The Respondent argues that the established resume collection system and the hiring needs of the clients dictated the hiring process.

Similarly, the Respondent notes that Mr. Petropoulos testified that, on one occasion in 1999, he was asked to submit several candidates to its client, a utility company, who would then hire some of those candidates. (TR-IL 703-704). According to Mr. Petropoulos, he requested resumes from the technical support center; these resumes were sent to the technical support center through contract houses. (TR-IL 703, TR-AL 142). Mr. Petropoulos was to review these resumes and refer them to the utility company, who would ultimately decide which candidates to hire. (TR-IL 704). Mr. Petropoulos testified that the client needed people who were well-versed in structural engineering, had recent experience in concrete and steel structure design, and were well-rounded engineers. (TR-IL 704).

After reviewing the resumes, Mr. Petropoulos believed the Complainant's resume did not show recent experience, particularly in the areas specified by the company. (TR-IL 705). Mr. Petropoulos admitted to a familiarity with Mr. Hasan's work at the LaSalle project, but denied knowing that Mr. Hasan had a prior connection to the utility company. (TR-IL 706-707). Moreover, he stated that he made his referral decision based solely on the resumes, and the Complainant's whistleblowing activities had no impact on his 1999 decision. (TR-IL 707-709). Mr. Petropoulos finally noted that this review was the only time Mr. Hasan's resume came to his attention. (TR-IL 708).

The Complainant argues that he submitted his resume a number of times, implying that such tenacity would have guaranteed him employment, but for his whistleblowing activities. Peter Meehan, senior manager of Sargent & Lundy's Corporate Human Resources Department, offered a comprehensive discussion of the process for gathering resumes. Generally applicants submit resumes to Sargent & Lundy; an employee then enters them into a resume data bank, called the Resumex System. Mr. Meehan also testified on the three methods the Respondent uses to hire engineers.

One method of hiring, as summarized by the Respondent's Counsel, involves a contract house referring a resume directly to a hiring partner. The hiring partner then reviews the resumes and selects a number of candidates, who are then hired or rejected by the client. This method was used by Mr. Petropoulos in 1999. (TR-AL 142-143).

Another method of hiring is for temporary service, which is overseen by James Kelnosky. Sargent & Lundy is broken into departments, and then into groups. (TR-IL 461). Each of these disciplines has its own manager, who reports his needs to Mr. Kelnosky. Usually these needs involve short-term, but immediate employees due to emergencies, or rapid growth with insufficient personnel to finish a project in progress. (TR-IL 466). Mr. Kelnosky then searches Resumex by keywords, depending on the employer's particular needs. The database generates a number of resumes fitting that description. Mr. Kelnosky's employees then call people from that list. When those calls yield the number of personnel requested, the phone calls cease. According to Mr. Meehan, because time is generally of the essence, there is only a superficial resume review, not an examination of the applicant's qualifications or even a comparison of resumes. (TR-IL 466-467).

Finally, the Respondent also hires full-time employees through Mr. Meehan's department. Again, the discipline managers contact the human resources department and discuss their needs, the amount they are able to spend, and the extent of recruitment that is required. (TR-IL 461-462). Resumes are then collected from the mail, the Internet, and the Resumex System. (TR-IL 462-463). Once the resumes are collected, human resource staff look at prior experience, education, and any additional criteria required by the discipline managers in order to make a general cut, based on the applicant's experience and education and how that relates to the position for which he/she is applying. (TR-IL 462). The resumes are then submitted to the discipline managers, who decide which candidates to interview. (TR-IL 464). Ultimately, the decision to hire depends on the particular business group, but the discipline manager, not the human resources department, has the final say as to which candidate is hired. (TR-IL 464-465). Mr. Meehan noted that there is probably more weight given to previous employees, whose files are marked eligible for rehire. (TR-IL 463). Similarly, if an applicant is rejected, the Resumex System indicates that rejection, and the Human Resources staff do not refer that resume for future consideration. (TR-IL 474, TR-AL 143).

Mr. Meehan also testified about the application of the hiring and resume gathering processes to the instant case. The Complainant applied for a position as a civil structural

engineer with Sargent & Lundy on July 22, 1997. (DX 3). Despite having knowledge of Mr. Hasan's previous litigation against the company, Mr. Meehan referred the resume to Artim Dermenjian, the discipline manager for the nuclear department's civil structural engineering unit. (TR-IL 469). Mr. Hasan was interviewed on November 11, 1997. (DX 13 *et seq*). The interviewers included Mr. Dermenjian, Javad Moslemian, Ismail Kisisel, and James Kamba, the discipline manager for civil structural engineering of the fossil department. (DX 13, TR-IL 471-472).

During their interview, Mr. Moslemian noted the Complainant was most likely somewhat "rusty" because he had been unemployed since May 1994. (DX 13(c)). He noted that Mr. Hasan showed "average basic knowledge" in response to some technical questions on concrete design. (*Id.*) Furthermore, while the applicant did not know MathCad, he stated that Mr. Hasan expressed a willingness to learn it on his own time. (*Id.*) Mr. Moslemian recommended Mr. Hasan for a structural position with the nuclear department. (*Id.*) Dr. Kisisel gave the Complainant the highest marks in his interview evaluation. He noted Mr. Hasan's "considerable experience and technical know how in the concrete and structural design and pipe support." He recommended Mr. Hasan for a structural and civil position with the nuclear department. (DX 13(d)).

Mr. Kamba, however, did not recommend the Complainant for a position. On the interview evaluation form, he noted that Mr. Hasan did not show adequate technical knowledge in expansion anchor behavior, and was confused about certain programs. (DX 13(a)). Mr. Kamba characterized Mr. Hasan's basic steel knowledge as "adequate." (*Id.*) Mr. Kamba testified that, based on his resume, Mr. Hasan's experience was mostly in hanger design at nuclear power plants. (TR-IL 679-680). He concluded that the Complainant was an average candidate, who "didn't have the skills to fit in with the fossil power group." (TR-IL 680). Mr. Kamba also noted that he had not heard of the Complainant prior to the 1997 interview, nor was he aware of litigation between Mr. Hasan and Sargent & Lundy. (TR-IL 680-681).

Likewise, Mr. Dermenjian did not recommend Mr. Hasan for employment. He stated that the Complainant's experience in structural engineering was average, and that he did not bring a new technical expertise to the table. (DX 13(b)). Mr. Dermenjian noted Mr. Hasan's eagerness to restart his engineering career, from which he has been absent since 1994. (*Id.*) Mr. Dermenjian also testified in the instant case. He first noted that when he interviewed Mr. Hasan, he was unaware that Mr. Hasan was a whistleblower or that he was involved in litigation with Sargent & Lundy. (TR-IL 651). Mr. Dermenjian also stated that while he did not recommend Mr. Hasan for a position, he believed his evaluation was a good one, rather than a negative evaluation. (TR-IL 662-663). However, while he stated that Mr. Hasan's expertise and experience were "average," which he defined as "meets expectations," Mr. Dermenjian further testified that he had people with those capabilities on staff, and he was looking for different types of capabilities at that time. (TR-IL 663).

As noted above, the discipline managers have the final say as to which candidate is hired. (TR-IL 464-465). After the Complainant's 1997 interview, those charged with the power to hire did not make a determination favorable to Mr. Hasan. According to their testimony, Mr. Dermenjian and Mr. Kamba based their ultimate decision on both the Complainant's interview and his resume, including his experience, ability, and absence from the field.

In his discussion of the hiring process, Mr. Meehan noted that when an applicant is rejected, the Resumex System indicates that rejection, and the Human Resources staff does not refer that resume for future consideration. (TR-IL 474, TR-AL 143). Accordingly, when the Complainant was rejected by Mr. Kamba and Mr. Dermenjian in 1997, his resume was not referred through the Resumex system in 1999. Moreover, the Respondent has noted several times that the resume data bank includes approximately 8,000 resumes. Thus, the only time Mr. Hasan's resume was considered in the statutory period was by Mr. Petropoulos, who rejected Mr. Hasan because he believed the Complainant's resume did not show recent experience, particularly in the areas specified by the client-company. (TR-IL 705).

After the respondent has rebutted the complainant's initial showing, the complainant can rehabilitate his case by showing that the reasons proffered by the respondent are not its true reasons, but rather, a mere pretext for discrimination. In the instant matter, the Complainant tries to rehabilitate his case by asserting that Constantine Petropoulos knew of both Mr. Hasan's involvement at the LaSalle project, as well as his former association with a utility company, which was a client of the Respondent's. Mr. Petropoulos was charged with selecting resumes, then submitting them to the utility company, which would then decide which candidate to hire. Mr. Hasan argues that Mr. Petropoulos was aware that the Complainant had been laid off by the power company, and thus refused to recommend him for the job to avoid displeasing the Respondent's client.[21] Mr. Petropoulos admitted a familiarity with the Complainant's actions at LaSalle, but denied any knowledge of a past history between Mr. Hasan and the utility company. Mr. Hasan failed to offer any evidence of Mr. Petropoulos' knowledge to support his allegation.

Aside from making the allegation, the Complainant likewise failed to demonstrate that Mr. Petropoulos acted out of retaliation for the occurrences at the LaSalle plant. Moreover, Mr. Meehan explained the Respondent's methods of hiring. For temporary hires, the computer generates a list of potential candidates, and they are contacted in the order generated. Mr. Hasan has not demonstrated how this method, which seems to be the luck of the draw, was intentionally used by the Respondent to exclude him from employment opportunities. Finally, Mr. Hasan was rejected in 1997. He argues that Dr. Kisisel's endorsement should have been sufficient to hire him. However, the Complainant fails to show, by a preponderance of the evidence, that the discipline managers, who hold hiring authority, knew of his protected activities or past litigation,

[21] Complainant's Reply (Third) Brief, at 14 (Sep. 9, 2002).

when they rejected him in 1997. Once that rejection is noted into the resume data bank, that resume is not considered for future employment. While the Complainant raises a great number of accusations and allegations, he also bears the burden of demonstrating that the evidence supports his assertions. Here, the Complainant falls short.

After reviewing the facts and the record, I find that, while the Complainant has raised an inference of a nexus between his protected activity and the adverse action, the Respondent has established legitimate, nondiscriminatory reasons for not hiring him within the 180-day statutory period. The Complainant has failed to rehabilitate his case because he has not demonstrated that the Respondent's motives were anything other than legitimate and nondiscriminatory.

Post-Claim Filing

The second adverse action in this case involves the Respondent's continuing failure to hire the Complainant from December 1999 to October 2001. This on-going rejection originated from a December 1999 decision to never hire the Complainant. This decision came approximately within one month from the date Mr. Hasan filed his OSHA complaint. As the Respondent correctly notes in its brief, such "temporal proximity is sufficient as a matter of law to establish the final required element in a prima facie case of retaliatory discharge."[22] While this case involves a claim of retaliatory failure to hire, rather than wrongful discharge, the governing principle still applies. Thus, I find that the Complainant has established a *prima facie* showing of a nexus between his protected activity and the Respondent's December 1999 decision.

Again, the Respondent can rebut the *prima facie* showing by demonstrating a legitimate, non-discriminatory reason for its decision. Mr. Meehan first testified as to the process that was used at the December 1999 discussion regarding further consideration of Mr. Hasan's future employment with the Respondent. According to Mr. Meehan, he met with Mr. Jacques, the company's president, Dr. Singh, a vice president, and Mr. Hagen, who was on the leadership team. The four discussed a number of items, including Mr. Hasan's behavior during the LaSalle incident, as well as his lack of technical expertise. (TR-IL 500). Mr. Meehan recalled frustration with Mr. Hasan among the group; they characterized him as argumentative, arbitrary, inflexible, self-serving, and not a team player. (TR-IL 500-501). Likewise, those who disagreed with the Complainant were accused of being cheats, liars, incompetents, or involved in a cover-up. (*Id.*) Mr. Meehan noted that Sargent & Lundy was becoming more of a consulting company, and was going to ask their engineers to interface with clients. The group concluded that Mr. Hasan was not a potential employee to fulfill this role. (TR-IL 501).

The Complainant conducted his cross-examination of Mr. Meehan at the second hearing. Mr. Meehan again described the circumstances of the executives' meeting regarding Mr. Hasan. Again, Mr. Meehan stated that he had decided Mr. Hasan was not a suitable representative of the

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[22] *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

company to its clients. (TR-AL 194). Mr. Meehan specifically enumerated three reasons for his decision. First, he noted that Mr. Hasan did not trust Sargent & Lundy's employees. (*Id.*) Secondly, Mr. Hasan did not trust the Respondent's work. (*Id.*) Finally, Mr. Meehan asserted that the Complainant had no use for the Respondent's work and did not believe in the product that Sargent & Lundy produced. (*Id.*) Based on these factors, Mr. Meehan concluded that the Complainant could not effectively represent Sargent & Lundy to the clients. (*Id.*)

On cross-examination Sean Hagen clarified the effect of the Complainant's disagreement with Sargent & Lundy's practices at the LaSalle site on subsequent evaluations. He stated, "the fact that he raised a concern that he felt strongly about, there's nothing negative about that." (TR-IL 859). He continued that such an action "may actually be a positive thing. You need somebody that's going to stand up and raise a concern and issue.... It's one way to assure yourself you're going to end up ultimately with a safe project, a safe design." (TR-IL 859-860). However, whether or not someone raises those concerns, if a person "has not displayed an understanding of the engineering fundamentals and principles, of how to apply it, that has not applied appropriate analytical techniques to do something, ... has not been able to communicate effectively, [and] has not been able to work with the other members on the project, effectively, as a team," then those negative attributes would result in a lower ranking on an evaluation. (TR-IL 859).

Mr. Hagen also testified with respect to the decision never to hire the Complainant. Mr. Hagen began by recalling his first encounters with the Complainant, as they worked together on the LaSalle project. He found Mr. Hasan to be generally inflexible, especially regarding the approaches that should have been used and how the pipe connections should have been modeled. (TR-IL 530). Mr. Hagen stated that he had a negative impression of the Complainant from their first meeting because he believed Mr. Hasan had a different agenda or ulterior motives. (TR-IL 531). He also felt that Mr. Hasan had additional concerns with Sargent & Lundy that went deeper than the pipe connections; however, Mr. Hagen testified that he was not aware of Mr. Hasan's existing litigation with the company at that time. (*Id.*)

Mr. Hagen noted that the Complainant was upset when they disagreed over the connection issue and unwilling to accept different assessments; as a result he started filing Problem Identification Forms (PIFs). (*Id.*) Mr. Hagen expressed concern that the Complainant immediately mentioned escalating the situation by threatening to go to the NRC; Mr. Hagen believed this was an extreme approach to dealing with a difference of opinion on a technical issue. (TR-IL 533). He later added that Mr. Hasan's reactions went beyond the technical issues, which led Mr. Hagen to believe the Complainant did not have very good judgment. (TR-IL 552). Similarly, he did not think that Mr. Hasan had a good grasp of applying fundamental engineering principles to practical applications. (*Id.*) In sum, Mr. Hagen concluded that the Complainant was very difficult to work with, obstinate, and inflexible. (TR-IL 572).

Once again, the Complainant can rehabilitate his case by demonstrating that the Respondent's actual motive was pretextual, rather than the legitimate, nondiscriminatory reasons offered. In the present case, the Complainant claims that Mr. Hagen committed perjury regarding Mr. Hasan's abilities and understanding of engineering principles.[23] As noted in testimony, Mr. Hagen was not the only official to conclude that the Complainant was difficult to deal with and did not have the best solutions to the problems at hand. Moreover, these statements reflected the opinions of Mr. Hagen; if he held those opinions, Mr. Hagen did not commit perjury by expressing his opinions based on his prior encounters with the Complainant.

A lifetime ban on hiring the Complainant certainly raises a question regarding the Respondent's motives. However, those who testified on the Respondent's behalf noted Mr. Hasan's personality, echoing Mr. Hagen's opinions that the Complainant was difficult to deal with and inflexible. Additionally, Mr. Meehan gave a sound reason for the ban on hiring the Complainant when he explained that it was preposterous to think Mr. Hasan could be a reliable representative to recruit and maintain clients after spending so many years openly criticizing Sargent & Lundy and the work they do. Once again, Mr. Hasan has failed to rebut the Respondent's legitimate argument with anything other than allegations, which he has failed to prove.

I find that the Complainant has made a sufficient showing to establish a *prima facie* case of retaliation for the December 1999 decision to never hire him. However, after reviewing the entire record, I find that the Respondent has demonstrated a legitimate, nondiscriminatory reason for its decision. The Complainant has not rehabilitated his case because he has failed to demonstrate that the Respondent's motives were anything other than legitimate and nondiscriminatory.

Accordingly, the Complainant has failed to meet his burden, and thus, is not entitled to relief under the Energy Reorganization Act.

FINDINGS OF FACT

1. The Complainant was a contractor, employed by Commonwealth Edison, when he reported his disagreements with Sargent & Lundy to the NRC.

2. The Complainant thus engaged in protected activity.

3. The Respondent rejected the Complainant after he applied for employment, and the Respondent continued to seek applicants with similar qualifications as the Complainant's. Ultimately, the Complainant failed to demonstrate that he was qualified for the available positions.

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[23] Complainant's Reply (Third) Brief, at 24 (Sept. 9, 2002).

4. The Respondent was aware of the Complainant's protected activity when it refused to hire him.

5. The Respondent did not hire the Complainant between May 15, 1999 and November 15, 1999, for legitimate, nondiscriminatory reasons.

6. In December 1999, the Respondent permanently refused to hire the Complainant and continues to maintain that position. The Respondent, however, has demonstrated legitimate, nondiscriminatory reasons for its action.

Recommended Order

Accordingly, in view of the foregoing, and based upon the entire record, I hereby recommend that the claim filed by the Complainant, Syed M.A. Hasan, under the Energy Reorganization Act be dismissed.

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ROBERT J. LESNICK
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically became the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of the Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fd. Reg. 6614 (1998).